



Matoya & another v Attorney General & 6 others (Environment & Land Case 272 of 2013) [2024] KEELC 14188 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 14188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 272 OF 2013**

M SILA, J

OCTOBER 24, 2024

BETWEEN

BEATRICE MATOYA 1ST APPLICANT

TABITHA BONARERI MATOYA 2ND APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

LAND REGISTRAR KISII 2ND RESPONDENT

COUNTY SURVEYOR KISII 3RD RESPONDENT

DIRECTOR OF PUBLIC ROADS KISII COUNTY GOVERNMENT 4TH RESPONDENT

HENRY MANYANGE MATOYA ALIAS HENRY MATOYA MANYANGE 5TH RESPONDENT

JAMES MANYANGE OBIRI 6TH RESPONDENT

DAVID NYAKERIGA BOSIRE & ELIZABETH OMWEGA DAVID 7TH RESPONDENT

RULING

1. What is before me was actually filed as a Certificate of Urgency which contained prayers but with no actual application. I appreciated that the plaintiffs/applicants are acting in person and probably not too well versed with technicalities of procedure and I directed that whatever was filed as a certificate of urgency be deemed as an application dated 6 June 2024. I will henceforth therefore just consider it as the application dated 6 June 2024. What that application seeks is the following:

1. A certification of urgency.



2. That service be dispensed with in the first instance.
 3. That the court do issue orders directing the respondent or its agents to cease any ongoing road construction activities on the property known as Central Kitutu/Daraja Mbili/508 pending the hearing and determination of this case.
 4. That the notice of motion dated 5th July 2019 be heard and determined concurrently with this present application.
 5. That the honourable court do issue orders substituting the deceased 7th respondent with their personal representatives.
2. The application is based on two grounds being that the applicant (sic) continues to suffer loss by encroachment and invasion of private property; and secondly that the 7th respondents (sic) being David Nyakeriga Bosire and Elizabeth Omwenga David are deceased.
 3. To put matters into context, it is necessary that I give the background leading up to the filing of the application before me.
 4. This suit was commenced through a plaint filed on 19 June 2013 by the applicants in person. In that suit, there were three defendants, being Henry Manyange Matoya alias Henry Matoya Manyange (1st defendant), Teresa Kemunto Obiri (2nd defendant), and David Nyakeriga Bosire and Elizabeth Omwenga David (the two jointly named as 3rd defendants). The plaint was not very elegantly drafted but from what I can gather the plaintiffs averred to be administrators of the estate of Walter Otworu Matoya and sued in respect of the land parcel Central Kitutu/Daraja Mbili/508. The 1st defendant was said to be administrator of the land parcel Central Kitutu/Daraja Mbili/507; the 2nd defendant user of the land parcel Central Kitutu/Daraja Mbili/2031; the 3rd defendants users of the land parcel Central Kitutu/Daraja Mbili/2139. The applicants averred that the defendants have encroached into the land parcel Central Kitutu/Daraja Mbili/508. In the suit, the applicants wanted orders for the Land Registrar, Kisii, to re-beacon the land parcel No. 508, and a permanent injunction to restrain the defendants from that land.
 5. I see that the applicants filed an application dated 18 June 2013 seeking orders to have the Land Registrar beacon their land parcel No. 508. That application was heard by Okong'o J, who dismissed it in a ruling delivered on 4 April 2014. In his ruling, he did not think that he could give the order at that interlocutory stage as it was part of the main prayers in the suit, and further, that the Land Registrar and Surveyor were not party to the suit.
 6. Nothing happened in the matter until another application dated 7 December 2016 was filed. It more or less asked for the same prayers as in the application dated 18 June 2013, but this time it had the Attorney General, the District Land Registrar Kisii, the County Surveyor Kisii, the Director Public Roads Kisii County Government as 1st – 4th respondents, then the original three defendants as 5th – 7th respondents and it was filed as a miscellaneous application. The application was heard by Mutungi J, who dismissed it in a ruling delivered on 29 September 2017. Inter alia, Mutungi J found the application untenable as the plaint had not been amended to make the 1st – 4th respondents parties to the suit. He held that the plaintiffs could not convert the plaint into a miscellaneous suit midstream. He also thought that the application had a tinge of finality in the prayers that were sought thus could not be maintained.
 7. A third application dated 18 June 2019 was subsequently filed on 8 July 2019. It asked for orders of injunction against the defendants and also an order to direct the Land Registrar, Kisii, and the District Surveyor to re-beacon and/or demarcate the boundaries of the land parcel Central Kitutu/Daraja Mbili/508. Yet again, that application had 7 respondents similar to the application dated 7 December



2016 but there was no amendment of plaint. The application came before Onyango J for directions on 27 November 2019. She ordered joinder of the 1st – 3rd respondents, as they had no objection, but the order to join the Director Public Roads Kisii County Government was resisted. The court reserved further directions on 19 December 2019, on which day, with utility of Order 1 Rule 10, proceeded to join the County Government of Kisii as a defendant. No substantive orders were however given regarding the application dated 18 June 2019.

8. Nothing happened in the matter until a certificate of urgency dated 13 February 2020 was filed by the plaintiffs. That Certificate of Urgency was drawn in the manner of an application asking for orders that Elizabeth Omwenga David be dropped as 7th respondent but leaving David Nyakeriga Bosire; and an ‘urgent’ plea for grant of prayer 1 in the plaint and grant of prayers in the application dated 7 December 2016 to define the boundaries.
9. The matter came up for directions before Onyango J on 11 March 2020. She gave orders for the County Surveyor and Land Registrar to visit the land parcel No. Central Kitutu/Daraja Mbili/508 and mark the boundaries and the OCS Nyanchwa to provide security. The plaintiffs were to bear the costs of the survey. On 9 July 2020, the 1st plaintiff was in court and she complained that no survey had been done. The court summoned the Surveyor, who attended court on 28 July 2020 and explained the delay, and time was extended to undertake the survey. On 13 October 2020, the Land Registrar, appeared in court and stated that they had been to the land more than four times and had fixed the boundary. He had a report dated 12 April 2019 which he had filed. The 1st plaintiff said that she was not in agreement with the report and Onyango J directed parties to file comments on it. The plaintiffs filed their comments and the court delivered ruling on 27 January 2021. In her ruling, the court was of opinion that the report determines the issues in controversy and she adopted the report. She directed the Land Registrar and Surveyor to proceed to the suit land and fix the boundaries within 30 days. Each party was to bear his/her own costs.
10. Another application dated 25 February 2021 was filed by the plaintiffs. This time they sought orders to have the Land Registrar and County Surveyor held in contempt for failing to implement the order dated 27 January 2021. Onyango J was not persuaded. She held that if the applicants were dissatisfied then they can file an appeal as the matter was concluded. She found no merit in the application and dismissed it.
11. Nothing happened until what is currently before me was filed. The 4th respondent (County Government of Kisii) filed Grounds of Opposition. It raised inter alia that the application is fatally defective as there is no motion but only a certificate of urgency; that the prayers cannot be granted in a miscellaneous suit; that the application is res judicata as the same prayers were determined by Okong’o J on 4 April 2014; that the parties can only substantively address the issues in a substantive suit through viva voce evidence; that the entire suit is a non-starter; that there is no cause of action against the 3rd and 4th respondent.
12. The applicants filed a ‘replying affidavit to the grounds of opposition.’ It is of course a strange document for one does not file a replying affidavit to grounds of opposition. That aside, this affidavit is an unsavoury one to say the least as it appears to me to be attacking the character of counsel acting for the 4th respondent in the matter. I will say no more about it.
13. I directed written submissions to be filed and I have seen the submissions of the applicants and those of the 3rd & 4th respondents. I have taken them into consideration before arriving at my decision.
14. Let me start by observing that in his submissions, counsel for the 3rd & 4th respondent submitted that the applicants have only been keen to file applications before each new judge in Kisii but not interested



in setting down the suit for hearing on its merits. Counsel also referred to the report filed and submitted that it confirmed that there is no encroachment into the applicants' land.

15. On my part, I think that the matter was finalized by Onyango J. My appreciation of what she did is that she adopted the report dated 12 April 2019 as the judgment of the court. There is therefore nothing in my opinion that is to proceed for hearing. The matter is concluded on the basis of the Land Registrar's report dated 12 April 2019. That report *inter alia* states that the suit land and the parcels of land that it borders all have a deficit in actual acreage on the ground, and what the Land Registrar recommended was that boundaries be fixed proportionately to the ratio between the registered area and total ground area. The final area of the suit land was to be 1.19 Ha and not 1.5 Ha as registered. The report further states that there are very mature trees demarcating the common boundaries. That report, as I have said, was adopted by the court as the judgment of the court. The court is therefore *functus officio* in so far as the hearing of this suit is concerned.
16. This application seeks three substantive orders. Firstly, for the court to issue orders to stop ongoing road construction; secondly, that the motion dated 5 July 2019 (*sic*) be heard and determined with the present application; and thirdly, the 7th respondent be substituted.
17. On the first issue, that is to stop road construction, I cannot give this order. As I have explained, this matter is finalized. If there is encroachment to the plaintiffs' land on the basis of a road construction, that would be a new cause of action for which the plaintiffs need to file a different substantive suit and demonstrate such encroachment. On the second issue, that is to hear the application dated 5 July 2019 (*sic*) the correct position is that there is actually no application dated 5 July 2019. What was filed was an application dated 18 June 2019 and it was filed on 8 July 2019. I already elaborated what was sought in that application, which were orders of injunction and orders to rebeacon/demarcate the boundaries. That application is overtaken by events since there was already issued an order for survey and a report filed which was adopted as a judgment of the court. Once judgment was entered on the basis of the report, any pending interlocutory applications fell by the wayside and were overtaken by the adoption of the report as a judgment. We cannot now be speaking of an order for injunction when the case is already finalized, or demarcation of boundaries when this has already been done and a report thereof filed, which is now the judgment of the court. Finally, on substitution, this court cannot grant that order. It has not been shown who the administrators of the estate of the deceased 7th respondents (they are actually the 3rd defendants) are so that substitution can be done. That prayer is dismissed.
18. There is really no need to say more. Upon adoption of the report as a judgment, the court is now *functus officio* unless it is in relation to execution of the decree. The court cannot now revisit issues related to injunction or rebeaconing as I have taken some trouble to elaborate.
19. In essence, I am not persuaded as to the merits of this application and it is hereby dismissed with costs to the so named 3rd & 4th respondents.
20. Orders accordingly.

DATED AND DELIVERED THIS 24 DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:

1st applicant (Ms. Matoya) - present ;



Mr. Mokaya present for the 3rd & 4th respondent ;

Mr. Ndiritu for the 1st & 2nd respondents;

N/A for the other parties;

Court Assistant – David Ochieng.’

